No. 81020-6

SANDERS, J. (dissenting)—The majority argues Mark Kilgore's judgment became final in 2002 and therefore *Blakely v. Washington*, 542 U.S. 296, 306, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) does not apply. To the contrary, the action against Kilgore was pending until 2005 when the trial court acted on the remand. The judgment therefore became final in 2005, after *Blakely*. I would remand for resentencing.

Under *State v. Evans*, 154 Wn.2d 438, 443-44, 114 P.3d 627 (2005), courts must revise exceptional sentences for cases pending when *Blakely* was decided in 2004. Therefore the majority correctly identifies the "'critical issue'" as whether Kilgore's case was final before *Blakely* was decided in 2004. Majority at 5 (quoting *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 327, 823 P.2d 492 (1992)). The majority also correctly asserts cases are final when "'the availability of appeal [has] exhausted . . . ,'" which can occur after the trial court exercises "independent judgment" on remand. Majority at 5-6 (quoting *St. Pierre*, 118 Wn.2d at 327); *see also State v. Barberio*, 121 Wn.2d 48, 50-51, 846

P.2d 519 (1993). However this occurred in 2005; nothing happened in 2002.

The majority relies on RAP 12.7, RAP 12.2, and RAP 2.5; but none pertains. Majority at 8-10. "The appellate rules make no effort to define a final judgment, and perhaps wisely so. At common law, a final judgment was one that disposed of all the issues as to all of the parties. No better definition seems to have evolved." 2A Karl B. Tegland, Washington Practice: Rules Practice RAP 2.2, at 82 (6th ed. 2004). The majority's discussion confuses finality of an appellate opinion with finality of a trial court judgment after remand:

> "RAP 12.7 defines the finality . . . . Finality is [when] the appellate court loses the power to change its decision. . . . [The appellate court loses the power to change its decision] when the appellate court issues its mandate . . . or . . . certificate of finality."

Majority at 8 (footnote and citation omitted) (quoting *State v. Hanson*, 151 Wn.2d 783, 790, 91 P.3d 888 (2004)). The majority misses the point: The appellate court may have issued its decision; however, when it remands for further proceedings the case cannot be final until after those proceedings conclude.

The majority seems to invoke RAP 12.7 and RAP 2.5 to argue appellate courts can review only some trial court actions on remand: "The pendency of a case otherwise final under RAP 12.7 can be revived pursuant to RAP 2.5(c). RAP 12.7(d)." Majority at 8-9.[1] Relying on a 1991 commentary[2] on RAP 2.5(c)(1),

the majority argues trial courts can restore case pendency only by revisiting an issue on remand: "If the trial court elects to exercise this discretion, its decision may be the subject of a later appeal, thereby restoring the pendency of the case." *Id.* at 9-10 (citing *Barberio*, 121 Wn.2d at 50 (citing 2 Lewis H. Orland & Karl B. Tegland, Washington Practice: Rules Practice 481 (4th ed. 1991)). But the majority never explains what constitutes an "exercise [of] discretion" that revives pendency. *Id.*

The majority seems to argue—somewhat confusingly—a decision not to hold a resentencing hearing is not an exercise of independent judgment on remand, but a decision at a resentencing hearing not to resentence would be just that: "Although *the trial court had discretion* under RAP 2.5(c)(1) to revisit Kilgore's exceptional sentence . . . , it made clear that in correcting the judgment and sentence to reflect the reversed counts, it was not reconsidering the exceptional sentence . . . ." Majority at 12-13. But how is a decision not to

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[1] It is unclear why the majority relies on RAP 12.7 because this rule does not address trial court action on remand; it codifies traditional doctrine in which appellate courts can lose power to modify decisions once the mandate issues. The issue here is the *trial court's* action on remand, not the appellate court's power to modify its own decision.

[2] RAP 2.5 was extensively amended in 1994 based on recommendations by the Washington State Bar Association. *See* 2A Tegland, *supra*, Rules Practice RAP 2.5 task force cmt. at 238.

resentence—after the appellate court reverses multiple criminal counts and remands "for further proceedings"—anything but an exercise of independent judgment? There is simply no meaningful difference in terms of finality between refusing to hold a resentencing hearing at all or holding a hearing and then refusing to alter the prior sentence.

The majority relies on RAP 12.7(d) and RAP 2.5(c), but together these rules give appellate courts power to change decisions while limiting the "law of the case" doctrine on remand.[3] This means the Court of Appeals had power in 2007 to review both its 2002 decision reversing Kilgore's convictions and the trial court's 2005 action on remand. However, these rules are irrelevant to when a trial court's action yields a final appealable judgment.

The majority also ignores important statutes and appellate rules that arguably address finality more directly than the rules it cites. For example RCW 9.94A.585—which prevails over any contrary provisions in the appellate rules—makes all sentences outside the standard range appealable. *State v. Pascal*, 108 Wn.2d 125, 131, 736 P.2d 1065 (1987). RAP 2.2(a) is also

[3] RAP 2.5(c)(1) restricts the doctrine by permitting trial courts to exercise independent judgment on remand and appellate courts to review this decision. Under RAP 2.5(c)(2), appellate courts may review their own earlier decisions in the same case and decide the matter on the basis of the law at the time of the later review. In other words, the law-of-the-case doctrine is not mandatory. *See generally* 2A Tegland, *supra*, Rules Practice RAP 2.5 author's cmt. 27, at 215-16.

important because it specifies which judgments are appealable as a matter of right once the trial court enters an order. And under RAP 5.2 the time for appeal begins upon entry of a judgment.

The majority also fails to discuss when the judgment in *Barberio* became final, yet it relies on this case to argue Kilgore's sentence became final in 2002. Majority at 12-13. Finality was not at issue in *Barberio* because the answer was simple: The judgment became final when the trial court "'affirm[ed] the exceptional sentence . . . .'" *Barberio*, 121 Wn.2d at 50 (quoting and affirming *State v. Barberio*, 66 Wn. App. 902, 903, 833 P.2d 459 (1992)). The trial court took *immediate action* on remand and "made only corrective changes . . ."; therefore the judgment became final right away. *Id.* at 51. Here the trial court waited two years before acting. But the outcome is the same: The judgment became final when the trial court acted on the remand.[4]

In sum, the majority cites various appellate rules at length but fails to explain how they apply to the question of finality in this case. Under the

[4] The majority tries to distinguish "acting on remand" from "taking independent judgment on remand." Majority at 11-12 & n.12 (analyzing *State v. Barberio*, 115 Wn.2d 1010, 797 P.2d 511 (1990)). Our cases make no such distinction; refusing to resentence and choosing to resentence are two sides of the same coin. And either act on remand—regardless of what we call it—is an exercise of independent judgment unless it is *strictly ministerial*. *Burrell v. United States*, 467 F.3d 160, 166 (2d Cir. 2006) (citing *Bateman v. Arizona*, 429 U.S. 1302, 97 S. Ct. 1, 50 L. Ed. 2d 32 (1976)).

majority's view, a trial court on remand renders an independent judgment on remand only when it holds a resentencing hearing—regardless of outcome—but when it reaffirms the prior sentence by not holding a hearing, it does not. This doesn't make sense.

The Ninth Circuit Court of Appeals articulated a better rule: A partially reversed judgment is not final until the lower court takes action on remand. *See, e.g.*, *United States v. Colvin*, 204 F.3d 1221, 1225 (9th Cir. 2000).[5] Under this "clear, easy-to-follow rule . . . [finality] will not turn on an assessment of whether [a] mandate leaves matters open to the [lower court]." *Id.* This rule is well-established. *See, e.g.*, *United States v. LaFromboise*, 427 F.3d 680, 683-84 (9th Cir. 2005).

The Second Circuit Court of Appeal's rule is slightly narrower but based on the same principle: A partially reversed judgment is not final—until the lower court amends the judgment on remand—unless the remand was strictly for a ministerial task. *Burrell v. United States*, 467 F.3d 160, 166 (2d Cir. 2006) (Sotomayor, J.).[6] *Burrell* became final on remand because "[t]his was not a

[5] The majority's decision to ignore persuasive authority is questionable because this is a case of first impression with no Washington authority on point.

[6] *Burrell*'s procedural posture was very similar to this case but the remand was different. In 2002 the appellate court affirmed one conviction, reversed the other, and remanded to "correct the judgment to reflect the dismissal." *United States v. Burrell*, 43 Fed. App'x 403, 408 (2d Cir. 2002) (unpublished). Approximately three

mandate that permitted the district court to undertake any action other than the ministerial correction explicitly set forth." *Id.* Had the remand not been strictly ministerial, however, the judgment would not have been final until the trial court acted. *Id.* at 164 (citing *Bateman v. Arizona*, 429 U.S. 1302, 1306, 97 S. Ct. 1, 50 L. Ed. 2d 32 (1976)).

Kilgore's remand in 2002 for "further proceedings" was not a remand for a ministerial correction so it was not a final judgment under *Colvin* or *Burrell*. Instead, the remand gave the trial court discretion on remand: "We reverse Counts I and II, affirm Counts III-VII, and remand for further proceedings." *State v. Kilgore*, 107 Wn. App. 160, 190, 26 P.3d 308 (2001) (*Kilgore* I), *aff'd*, 147 Wn.2d 288, 295, 53 P.3d 974 (2002) (*Kilgore* II). A proceeding is "[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment." Black's Law Dictionary 1324 (9th ed. 2009). Proceedings therefore are events that occur until final judgments are entered.

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years later the lower court amended Burrell's judgment. During this time lag, the Supreme Court decided a case that reduced Burrell's sentence if it applied to his judgment. *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). The key difference is *Burrell*'s remand "unambiguously permitted nothing more than the entry of an amended judgment" while here the court's mandate gave the trial court discretion on remand. *Compare Burrell*, 467 F.3d at 166 *with State v. Kilgore*, 107 Wn. App. 160, 190, 26 P.3d 308 (2001) (*Kilgore* I), *aff'd*, 147 Wn.2d 288, 295, 53 P.3d 974 (2002) (*Kilgore* II).

The appellate court's opinion determines the scope of a remand order. *United States v. Kendall*, 475 F.3d 961, 965 (8th Cir. 2007). Here the appellate court assumed the trial court would take further action on remand: It actually included instructions on how the State could recharge Kilgore on the reversed convictions, and the majority also admits resentencing was an option. *Kilgore* I, 107 Wn. App. at 177-82, *aff'd*, *Kilgore* II, 147 Wn.2d at 295; majority at 4, 12, 14.

A reversal and remand for further proceedings is not final so long as judicial action is still required in the lower court. *Prudential Ins. Co. of Am. v. Cheek*, 259 U.S. 530, 533-34, 42 S. Ct. 516, 66 L. Ed. 1044 (1922). Here the trial court first acted on the remand in 2005; accordingly the judgment became final at that time. *LaFromboise*, 427 F.3d at 686 (conviction not final until lower court acts on remand to amend judgment); *Colvin*, 204 F.3d at 1225-26. It was error for the trial court not to take *Blakely* into account and hold a resentencing hearing.

The trial court tried to avoid *Blakely* by characterizing its action in 2005 as ministerial and then backdating its order to 2002: "I am not re-sentencing the Defendant based upon the decisions of the higher court. Rather, I am correcting the Judgment and Sentence, and that's what we need to accomplish." Verbatim

Report of Proceedings at 13 (Oct. 7, 2005). The court also tried to eliminate the time lag by asserting Kilgore's judgment was final when the mandate issued in October 2002 nunc pro tunc to November 1, 2002. Clerk's Papers at 100-01. This was an invalid use of a nunc pro tunc order. "The office of such order or decree is to record judicial action taken, and not to remedy inaction." *Bruce v. Bruce*, 48 Wn.2d 635, 636, 296 P.2d 310 (1956). There was no hearing on November 1, 2002; the trial court's 2005 order was invalid.[7]

Washington has already adopted the federal court's approach to finality for purposes of collateral review: A judgment is not final when the appellate court remands for further proceedings. *See, e.g.*, *In re Pers. Restraint of Skylstad*, 160 Wn.2d 944, 946, 162 P.3d 413 (2007). The United States Supreme Court holds judgments are final only when remanded "for a ministerial duty." *Bateman*, 429 U.S. at 1306; *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 216 n.8, 97 S. Ct.

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[7] The Court of Appeals also tried to characterize the trial court's action as "ministerial" in an effort to find the judgment final in 2002: "When the trial court chose not to exercise its discretion under *Barberio* to resentence Kilgore on remand 'for further proceedings,' *our remand became ministerial in nature* . . . . ." *State v. Kilgore*, 141 Wn. App. 817, 829, 172 P.3d 373 (2007) (Kilgore III) (emphasis added). Such magical transformations might happen to Cinderella's carriage at midnight, but they do not occur under Washington law: "It may be used to make the record speak the truth, but not to make it speak what it did not speak but ought to have spoken." *State v. Ryan*, 146 Wash. 114, 117, 261 P. 775 (1927) (quoting from 15 Ruling Case L. 622) (explaining the function of a nunc pro tunc order). A remand "for further proceedings" is not ministerial.

1782, 52 L. Ed. 2d 261 (1977) (citing *Pope v. Atl. Coast Line R.*, 345 U.S. 379, 382, 73 S. Ct. 749, 97 L. Ed. 1094 (1953); *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 67-68, 68 S. Ct. 972, 92 L. Ed. 1212 (1948); *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 72-74, 67 S. Ct. 156, 91 L. Ed. 80 (1946)).

Kilgore's judgment and sentence became final in 2005—after *Blakely*—when the trial court erroneously refused to resentence him.

I dissent.

AUTHOR:

Justice Richard B. Sanders

WE CONCUR:

Justice Barbara A. Madsen